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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1969

No. 505

JACK W. JERNIGAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioner, JACK W. JERNIGAN, prays that a writ of certiorari issue to review the opinion and judgment of the Court of Appeals for the Fifth Circuit rendered in these proceedings on May 13, 1969, and the order of said Court

denying rehearing entered on the 7th day of July, 1969.

OPINION BELOW

The opinion of the Court of Appeals for the Fifth Circuit is unreported. The text of this opinion appears at Appendix A.

JURISDICTION

The judgment of the United States District Court for the Middle District of Florida was entered on April 29, 1968. Appeal was timely perfected and on May 13, 1969, the Court of Appeals rendered a decision affirming judgment of conviction of the petitioner on two counts in each of two indictments that had been consolidated for trial. Petitioner filed a timely petition for rehearing. On July 7, 1969, the Court of Appeals entered its order denying rehearing without opinion. This petition for certiorari was filed less than

ninety days from the date aforesaid. The jurisdiction of this Court is invoked pursuant to Rule 37 of the Federal Rules of Criminal Procedure and 28 U.S.C. 1254.

QUESTIONS PRESENTED

1. Is an Internal Revenue agent (as contrasted with a special agent) required to give a Miranda type warning to a suspect tax payer when the revenue agent interrogates the suspect in his office and demands that he produce documents for examination at a time when the agent has previously obtained knowledge that the suspect may be guilty of a criminal violation of the Internal Revenue laws of the United States?

2. Are Miranda type warnings required if, in fact, the suspect is not in police custody, but is alone in his office and is being interrogated by an Internal Revenue agent concerning his taxes and demand is then and there made to produce documents that will clearly lead to his

criminal prosecution?

STATUTES, RULES AND CONSTITUTIONAL PROVISIONS INVOLVED

Constitutional of the United States, Amendment V.

26 U.S.C. 7201(1);
26 U.S.C. 7206(1).

STATEMENT

The petitioner, JACK W. JERNIGAN, was charged in the first indictment (Case No. 67-81) with two counts of willfully and knowingly attempting to evade and defeat part of the tax due and owing by him and his wife for the calendar years 1960 and 1961 (Section 7201). The petitioner was also charged with filing a false return for the same years on behalf of himself and his wife under the provisions of Section 7206(1). The last two counts of the six count indictment charged him with willfully and knowingly making and subscribing a corporate tax return for Marion Engineering Associates, Inc. which was known by

him to be false for the years 1960 and 1961 (Section 7206(1). In the indictment identified as 67-119, petitioner was charged in the first two counts of the four count indictment with willfully and knowingly filing a joint return with his wife which he knew to be false for the years 1962 and 1963 (7201). In the last two counts he was simultaneously charged with filing a return for the same years on behalf of Marion Engineering Associates, Inc. (7206(1)).

The two indictments were consolidated for trial by order of the Court on December 4, 1967, and tried before a jury in Ocala, Florida, on April 22, 1968. In Case No. 67-81, the jury returned a verdict of "not guilty" as to Counts 1, 2, 3 and 4 (7201) and "guilty" as to Counts 5 and 6 (7206(1)). In Case No. 67-119, the jury returned a verdict of "not guilty" as to Counts 1 and 2 (7201) and "guilty" as to Counts 3 and 4 (7206(1)).

The trial Court entered its judgment on

April 29, 1968. Petitioner appealed, and on May 13, 1969, the Fifth Circuit Court of Appeals affirmed. Petition for rehearing was denied without opinion on July 7, 1969.

The majority of the facts relevant to the questions presented by this petition are the uncontroverted testimony of the Internal Revenue agent as appears in the transcript of these proceedings and, therefore, are introduced to the Court in summary fashion.

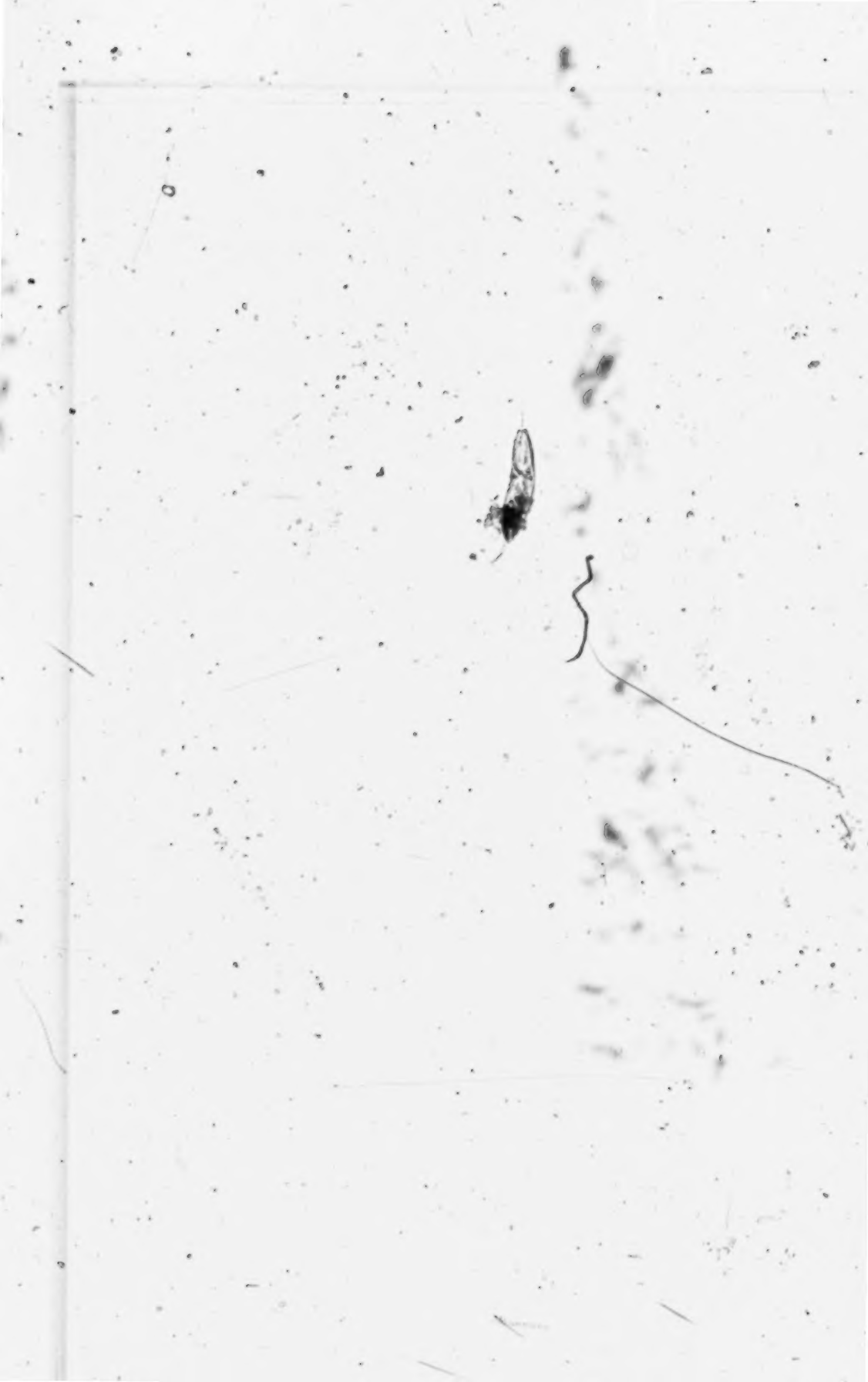
The petitioner is a practicing engineer, who was at the time of the indictments and trial, the president of Marion Engineering Associates, Inc. of Ocala, Florida. It was in this capacity that he signed the corporate returns for said corporation.

During the trial, a motion to suppress the confession and statements of the petitioner was made and evidence and testimony taken in the absence of the jury. Internal Revenue Agent Lexow testified that he first contacted the petitioner in petitioner's office. That prior to the

initial contact he had received certain information from a confidential source concerning a particular check from the Withlacoochee River Electric Co-operative payable to Marion Engineering Associates, Inc. in the amount of Four Thousand Seven Hundred Seventy Seven Dollars and Fifty Cents ($4,777.50) that had been endorsed by JACK W. JERNIGAN as president. As the trial developed, it became apparent that this particular check, along with others made the same way, were prima facie indications of petitioner having knowledge of false corporate returns filed in violation of Section 7206(1). The agent had with him at the time of the original interrogation knowledge as to the amount of the check, the date of the check, the name of the person endorsing it and the date of the transaction. Evidence developed during the trial showed that the monies received from the Withlacoochee checks were not reported by the petitioner nor by the company of which he was



president. The agent admitted that he did not warn or advise the petitioner that he had a right to remain silent and that any statements that he made could be used as evidence against him. Nor did he advise him of his right to counsel. As a matter of fact, the agent stated the petitioner said, "He did not want to make a statement without legal counsel." (R-227). Petitioner then asked if it would hurt him to make a statement (R-229), to which the agent replied, "I said, well, generally, it's to a person's benefit to be frank and honest." (R-229). The agent upon examination admitted that he never advised the petitioner that he had a right to cousult with and have present prior and during the interrogation a lawyer, either retained or appointed. The agent testified that a portion of his interrogation of the petitioner concerned the Withlacoochee River Electric Co-operative check (Government Exhibit No. 21) (R-215). The government failed to offer any evidence of



any nature that the petitioner had ever been warned of his rights by any person including the special agent who was brought into the case. The trial Court in denying the motion to suppress stated that it was relying on Mathis v. United States, 376 F.2d 597 (R-230), which held that because Mathis was a state prisioner he was not "in custody" within the apparent meaning of the doctrine set forth by the Supreme Court in Miranda v. Arizona, 384 U.S. 436. This Court subsequently reversed the Fifth Circuit Court of Appeals in Mathis (391 U. S., page 4), stating that "tax investigations frequently lead to criminal prosecution, just as the one here did." The Court rejected any such distinction as "too minor and shadowy" to warrant a departure from Miranda.

The special agent in the case below did not take the stand to testify as to any warnings given to petitioner.

REASONS FOR GRANTING THE WRIT

1. The decision of the court below has decided an important question of federal law which has not been settled heretofore by this Court. In the decision below, the Fifth Circuit Court of Appeals held that an Internal Revenue agent who has prior knowledge of an apparent tax deficiency is not required to give a tax payer, later indicted and convicted, a Miranda type warning in order to make the tax payer's statement admissible in evidence against him.

This Court, in Mathis v. United States, 391 U. S. 1 (1968), held that the rule enunciated in Miranda v. Arizona, 384 U. S. 456, 16 L. Ed. 2d 694, 86 S. Ct. 1602, applies to tax fraud investigations by revenue agents when the circumstances amount to custodial interrogation or otherwise deprive the defendant of his freedom by the authorities in any significant way. Lately, there have been a great many cases involving the question of when Miranda type warnings are

required in tax fraud cases. There are a growing number of district court decisions which require the full Miranda warnings, including the right to counsel, from the moment the tax payer is contacted by a special agent. Perhaps the leading case is United States v. Turzynski, 268 F. Supp. 847 (ND Ill. 1967), which holds that custody is not an essential condition for imposition of the duty to warn. The court observed there that involuntary self-incrimination results when a tax payer in ignorance of his rights, assumes that the interrogation is simply to determine his dollars and cents liability for taxes. The court went on to state that in some respects a tax investigation is more insidious and dishonest than the custodial interrogation, for the suspect in custody well knows his interrogators are seeking evidence to convict him of a crime while the tax suspect is permitted, and even encouraged to believe that no criminal prosecution is in contemplation. The rational of Turzynski, supra, has a growing

following. See United States v. Dickerson, 291 F. Supp. 633, (ND Ill. 1968), and United States v. Wainwright, 284 F. Supp. 129 (D Colo. 1968).

It is true that in the instant case the petitioner was not in custody nor was he interrogated in the same physical surroundings as that in U. S. v. Lackey, 7th Circuit, decided July 16, 1969. However, the Internal Revenue agent had information, through a confidential informant, of evidence which obviously indicated a fraudulent intent on the part of the petitioner and this was known to the agent before the initial interview. Under these circumstances, the rational of the Turzynski and Dickerson cases, supra, should be applicable. It is illogical and unreasonable to base the requirement of the Miranda type warnings upon the classification of the particular type of revenue agent, i. e., whether special or regular, where the regular agent interrogates the tax payer with a prior knowledge of probable fraudulent intent. The Internal Revenue Service is free to conduct criminal investigations

under the guise of routine civil audits.

In the instant case, neither the regular agent nor the special agent warned the tax payer of his constitutional rights. When the agent asked for a statement, the petitioner asked if it would hurt him to make a statement. The agent replied that it would be to a person's benefit to be frank and honest. The agent did not tell him that any statement that he made could be used against him in a criminal proceeding. Under these circumstances, the criminal is more fortunate than the tax payer in that he can recognize his situation through the visibility of a uniformed policeman; whereas, the suspect tax evader cannot, for the friendly Internal Revenue agent is usually an innocuous appearing and talking individual in ordinary clothes who seemingly wants to help the tax payer. It is the petitioner's contention that where it appears that a strong badge of fraud is developed in the investigation and it is known to the investigating agent, whether special or a regular agent, the agent is

then required to give Miranda warnings regardless of whether the suspect is in custody or not. The petitioner submits that the official character of the revenue agent makes compulsion to answer the incriminating questions so probable that the warnings are required to prevent it. There should be no distinction between the special agent or regular agent since any statement given to the regular agent in civil investigations can be turned over to the special agent for use in a criminal prosecution.

As the Court observed in Dickerson, supra, at page 636-637:

> "The government suggests that the defendant was in no way physically restrained but we doubt that he really felt free to walk out on the investigators from the Internal Revenue Service. In the absence of sufficient warnings and the assistance of counsel, there are innumerable factors which act on the tax payer's mind compelling him to 'cooperate' with the federal authorities."

The emphasis upon custody in Mathis, supra, is not readily applicable in most tax payer investigations since most tax payers believe or are lead to believe that it will be to their benefit to cooperate with the agent and most of the investigations take place in the tax payer's home or office.

To harmonize the decisions of the various district and circuit courts, it is imperative that this Court should settle the recurrent question of whether the Miranda type warnings are required in tax investigations where the tax payer is not in custody.

2. The question presented by this petition is of great importance, not just to the petitioner, but to every tax payer in the United States. The tax payer is often lead to believe, as in the instant case, that cooperation with the agent will result in a favorable outcome. In reality, the cooperative tax payer fares much worse than the individual who relies upon his constitutional rights.

The Mathis case, supra, held that Miranda was applicable where the tax payer was in custody or in an equally coercive environment. However, the requirement of custodial interrogation or coercive environment is not readily applicable to tax payer situations since most of the interrogations are held in the tax payer's own office and rarely is the tax payer told he cannot leave or that he can refuse to answer questions. The unsuspecting tax payer should not be penalized for the different interrogation surroundings for it cannot be denied that the tax payer, through his own admissions, can be sent to the same penitentiary for possibly as long as the felon who is protected under the Miranda and Mathis decisions.

CONCLUSION

The decisions of the courts of this country are becoming increasingly aware of the plight of the unsuspecting tax payer who is confronted with an agent of the Internal Revenue Service who ques-

tions the tax payer without any warnings of his right to remain silent, his right to an attorney and the fact that any statements or evidence volunteered can be used against him in a criminal prosecution. The Internal Revenue Service has recognized the problem for now a special agent is required to give certain warnings which previously were not given.

In the instant case, the petitioner stated to the regular agent that he did not want to make a statement without legal counsel. The petitioner then asked the agent if it would hurt him to make a statement. The agent replied that generally it is to a person's benefit to be frank and honest. The petitioner's statement was later used in the criminal prosecution. The agent clearly misrepresented and deceived the petitioner in getting the statement, which amounted to a confession of guilt. No warnings advising the petitioner of his constitutional rights were given.

The petitioner submits that where information is uncovered which tends to indicate a strong probability of fraud on the part of the tax payer and this information is known to the investigating agent, whether special or regular, then the agent is required to give Miranda warnings irregardless of whether the suspect is in custody or not. This question is of great public importance and the petitioner respectfully prays that this Court grant certiorari to decide the question herein presented.

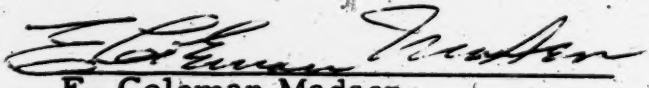
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CERTIFICATE OF SERVICE

I, E. Coleman Madsen, counsel of record for the petitioner herein, and a member of the Bar of the Supreme Court of the United States,

hereby certify that a true copy of the Petition for Writ of Certiorari was mailed this 22nd day of August, 1969, to the United States Attorney for the Middle District of Florida, and to the Solicitor General, Department of Justice, Washington, D. C.



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Jacksonville, Florida 32202
Counsel of Record



IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

No. 26360

UNITED STATES OF AMERICA,

Appellee,

versus

JACK W. JERNIGAN,

Appellant.

Appeal from the United States District Court for the Middle District of Florida

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(May 13, 1969)

Before TUTTLE and SIMPSON, Circuit Judges, and CASSIBRY, District Judge.

TUTTLE, Circuit Judge: On this appeal from a conviction of appellant for violation of the statute against wilfully and knowingly making and subscribing a false corporate tax return (26 U.S.C.A. §7206 (1)), appellant makes three principal arguments here.

He first questions the admission by the trial court of corporate records, part of which were not positively identified by the recently appointed secretary-treasur-

er of the company. In view of the fact that the documents came from the corporation's files and in view of the statement by counsel before us that the authenticity of these documents could have been established by other appropriate witnesses, we conclude that no prejudicial error was committed.

The second point raises again the question whether an internal revenue agent who knows of an apparent tax deficiency must give a taxpayer, later indicted and tried, a Miranda-type warning in order to make the taxpayer's statement admissible in evidence against him. In common with many other circuits, we have held that no such warning is required. See *Agoranos v. United States*, 5 Cir. ____ F.2d ____, No. 25997, dec. April 2, 1969. See also *Cohen v. U.S.A.*, 8 Cir. ( ) ____ F.2d ____, cert. denied ____ U.S. ____ (April 1, 1969) 37 L.W. 3363, 3365.

Finally, appellant complains of the admission into evidence of proof of checks made payable to his corporation, but cashed by him in years other than those included in the indictment. The trial court charged the jury as follows with respect to these checks:

> The Court has permitted evidence concerning transactions of the Defendant in years prior to, as well as subsequent to, the years covered by the Indictments - which evidence related to instances of understatement of income by the Defendant. This evidence was not admitted as proof of evasion in the tax years, but was admitted solely and exclusively for

> the purpose of showing a pattern of conduct on the part of the Defendant in earlier and subsequent years, and bears only upon the intent of the Defendant to violate the Statute for the years set forth in the Indictments, and for that limited purpose only. This evidence of prior and subsequent conduct is not conclusive as to the Defendant's intent in the years charged in the Indictment, but, is merely a circumstance to be considered along with the other evidence in determining whether or not there was an intention on the part of the Defendant to defraud the Government of the taxes alleged to be due.

Appellant criticizes this charge because he says there was no proof offered of any falsity or deficiency in income tax payments for the years in which these checks were issued. We think the charge is proper, because there was proof as to each of the checks of the making of the check and of the fact that, while the checks were made payable to the corporation for services rendered by it, they were endorsed personally by the appellant, and, in one instance cashed in the presence of the maker of the check by appellant personally. This is what was found to have occurred as to substantial items of corporation monies as to the years in issue. It showed a pattern of conduct whereby appellant personally used funds that the jury had the right to believe truly belonged to the corporation. In his statement to the revenue agent, appellant stated that all of these items were used by him personally and were not put into the company's account. Proof

of this repetitious conduct was admissible for the limited purpose of showing the intent of the appellant, where, otherwise it might be claimed that the acts in the tax years were either inadvertent or innocent. See *Escobar v. United States,* 5 Cir. (1967) 388 F.2d 661.

Finally, it was not necessary for the Government to prove a deficiency in tax for the years in question. See *Johnson v. United States,* 1 Cir. (1963), 325 F.2d 709. The crime was complete when, as the jury found, appellant wilfully made and subscribed a return, under the penalties of perjury, which was false as to a material matter. Here, the omission of substantial amounts of corporate income, represented by checks belonging to this corporation, but withheld and cashed by the appellant, done with wilfull intent, fully satisfies the requirements of the statute.

The judgment is AFFIRMED.

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